PUBLIC PROSECUTOR

v.

NGOI MING SEAN

HIGH COURT MALAYA, SEREMBAN
AJAIB SINGH J
[CRIMINAL TRIAL NO. 1 OF 1980]
26 SEPTEMBER 1980

CRIMINAL PROCEDURE: *Private defence - Right of private defence - Charge under s. 304 Penal Code - Cause of death - Ingredients of the charge - To prove beyond reasonable doubt - Section 92, 102 Penal Code.*

The accused who was a police detective was charged with culpable homicide not amounting to murder by causing the death of one Yong Foo Min an offence punishable under s. 304 of the Penal Code.

The accused had gone to the 747 Bar with four others at about 11.00 p.m. Inside the bar a quarrel started between the accused and the deceased which was intiated by the deceased. The deceased continued to be aggressive even though the accused had identified himself as a police officer. As the accused anticipated trouble, he attempted to run out of the bar by climbing over the counter but the deceased followed and confronted the accused preventing him from climbing over it. The deceased became angry, abusive and aggressive and threatened the bar proprietor that he would smash up the bar if the accused did not come out of the counter.

The accused then ran towards the toilet area to be out of the bar but was again confronted by the deceased. The accused took out his revolver and his authority card to prove that he was really a police officer but the deceased rushed to grab the revolver and there was a struggle. As both of them struggled to gain control of the revolver, the accused fired a shot which hit the deceased in the chest.

The defence case was that the accused did no more than exercise his right to private defence.

The question which the Court had to decide was whether in all the circumstances of this case the accused had a reasonable apprehension that the deceased would cause his death or inflict grevious hurt to his body.

Held:
The accused's act which caused the death of the deceased was done in the exercise of his right of private defence and that was not in excess of that right. At the stage when the accused and the deceased were struggling for the revolver the accused had a reasonable apprehension of death or grievous hurt at the hands of the deceased. The assault by the deceased had indeed assumed a dangerous form and the accused was placed in a situation of such great peril that he had no time to think or do anything else but to fire the shot from his revolver.

[Acquitted and discharged. Right of Private defence: Per: Ajaib Singh J.]

> The Penal Code provides that nothing is an offence which is done in the exercise of the right of private defence of a person's body. But there is no such right where the person has time to seek the protection of the public authorities. Nor will this right of private defence extend to the inflicting of more harm than is necessary for the purpose of defence. Subject

to these limitations the right of private defence of the body extends even to the voluntary causing of death or any other harm to the assailant if the person who exercises his right of private defence is under a reasonable apprehension that death or grievous hurt would be caused to him by the assailant. The right of private defence commences as soon as there is reasonable apprehension of danger to the body. This right continues as long as such apprehension of danger continues. (see ss. 96 to 102 of the Penal Code). And it goes without saying that the right of private defence ceases and is not available when there is no more apprehension of danger to the body.

Cases referred to:
Musa bin Yusof v. PP [1953] MLJ 70
Alingal Kunhinayan v. Emperor ILR 28 Mad 454
Govindan Neelambaran v. State of Kerala [1960] AIR Ker 258
Jai Dev v. State of Punjab [1963] AIR SC 612
Survade v. State of Gujarat [1972] 2 Cr LJ 1574

Legislation referred to:
Evidence Act 1950, s. 33
Penal Code, ss. 96, 97, 98, 99, 100, 101, 102, 304

Other source referred to:
Mayne's Criminal Law of India, 4th Edn., p. 231

For the public prosecutor - Balia Yusof bin Wahi, DPP
For the accused - Manjeet Singh Dhillon; M/s. Manjeet Singh Dhillon & Co.

JUDGMENT

Ajaib Singh J:

The accused who is a police detective is charged with culpable homicide not amounting to murder by causing the death of Yong Foo Min an offence punishable under s. 304 of the Penal Code.

Up to the point when the accused fired a shot from his revolver which resulted in the death of the deceased the facts are not very much in dispute. The accused had gone to the 747 Bar with four others at about 11.00 p.m. Inside the bar he was confronted by the deceased who asked him a few personal questions. A short while later the accused went to the toilet at the rear to ease himself and he waited for his turn while the deceased was already there and about to urinate. Here a quarrel started between them. The deceased said he was unable to pass water while the accused was standing next to him and the accused replied that he could take his time. The deceased became angry and aggressive. He started scolding the accused and wanted to have the matter settled then and there. The accused told the deceased that he was a police officer. He took out his police authority card and showed it to the deceased but to no avail. The deceased persisted in his aggressiveness until he was pulled away by one of his own friends to the passage way which is between the bar proper and the toilet area.

Afraid that the deceased was out to create trouble the accused ran into the counter area from the toilet in order to run out of the bar by climbing over the counter but the deceased ran through the passage way to the counter and confronted the accused. He stood in front of the counter preventing the accused from climbing over it. The deceased was very angry, abusive and aggressive and he threatened the bar proprietor telling him to get the accused out from behind the counter otherwise he would smash up the bar. The deceased even tried to claim over the counter to get at the accused but was pulled back by his friend. The accused then ran back from the counter towards the toilet area with the intention of going out of the bar through the passage way.

Here the evidence for the prosecution and the defence is somewhat in conflict. The evidence of the deceased's friend Loi Ngok Wan is that at this stage when the accused went to the rear from the counter the deceased also went towards the rear through the passage way. Loi Ngok Wan said that he himself followed the deceased. When he opened the door at the passage way leading to the toilet area he heard a shot and saw the accused holding a gun in both his hands pointing at the deceased. He said that the accused and the deceased were about four feet apart. The deceased was holding on to his chest and he helped him out through the passage way and to a chair in the bar.

The evidence of the accused is that he rushed back from the counter to the toilet area with the intention of going through the passage way and out of the bar. As he was approaching the door to the passage way the deceased suddenly rushed in and confronted him. The accused said that he then took out his revolver with his right hand and held his authority card in his left hand with the intention of showing the deceased that he really was a police detective. But the deceased rushed forward and tried to get hold of the revolver by grabbing it with his right hand. At the same time the deceased caught hold of the accused's right shoulder with his left hand. As both of them struggled to gain control of the revolver the accused fired a shot which hit the deceased in the chest. The accused said that they were just about a foot or so apart from each other when the shot was fired.

The evidence of the chemist is that from his examination of the deceased's shirt and the gunpowder found around a hole near the chest area of the shirt he was of the opinion that the gunshot was fired from distance of between one and two feet. In the light of the evidence of the chemist and that of the accused the evidence of the deceased's friend Loi Ngok Wan who said that the accused and the deceased were four feet apart cannot be true. They must have been within a foot or so from each other.

Mr. Manjeet Singh Dhillon for the accused submitted at the close of the prosecution case that there was no evidence of the cause of death of the decease. The doctor who did the post-mortem did not say what exactly was the cause of death. It was submitted that the charge under s. 304 of the Penal Code could not therefore stand because one of the ingredients of the charge is the cause of death of the death of the deceased and this ingredient had not been proved.

I am afraid I cannot agree with this submission that there was no evidence as to the cause of death of the deceased. The doctor who did the post-mortem of the deceased was unable to give evidence at the trial and his deposition recorded in the preliminary enquiry was put in evidence under s. 33 of the Evidence Act. It is true that the doctor did not specifically state the exact cause of death of the deceased but upon reading his deposition there can be no doubt that the death was caused by the bullet which had passed through the chest of the deceased and had penetrated a lung. The doctor had given his opinion that the deceased would have died within a few minutes after the shot was fired. Indeed when the police arrived at the scene shortly afterwards they found the deceased dead in the bar. In a criminal trial it is incumbent upon the prosecution to prove any requisite ingredient beyond reasonable doubt this does not mean proof beyond a shadow of doubt. The probability that the deceased came to his death by no other cause but by the injury he received from the bullet is so great that no other reasonable inference can be drawn from the evidence before the Court.

The defence case is that the accused did not than exercise his right of private defence. In the evidence on oath the accused said that when the deceased tried to snatch his revolver he became frightened and thought that if the deceased got hold of the revolver he would

kill him. The accused said that at that stage he genuinely feared for his life at the hands of the deceased because of the threats and aggression with which the deceased had confronted him from the time that he had entered the bar. He had no intention of killing the deceased but had fired the shot in self-defence. He had been in the police force for 15 years and had fired never shot at any person. This was the first time such an incident had taken place in his life.

The Penal Code provides that nothing is an offence which is done in the exercise of the right of private defence of a person's body. But there is no right where the person has time to seek the protection of the public authorities. Nor will this right of public defence extend to the inflicting of more harm than is necessary for the purpose of defence. Subject to these limitations the right of private defence of the body extends even to the voluntary causing of death or any other harm to the assailant if the person exercises his right of private defence is under reasonable apprehension that death or grievous hurt would be caused to him by the assailant. The right of private defence commences as soon as there is reasonable apprehension of danger to the body. This right continues so long as such apprehension of danger continues. (see ss. 96 to 102 under Penal Code). And it goes without saying that right of private defence ceases and is not available when there is no more apprehension of danger to the body.

Mr. Manjeet Singh Dhillon cited several cases on the scope and applicability of the right of private defence but for the purpose of this case I need refer to only three or four of those cases.

In the case of *Musa bin Yusof v. PP* [1953] MLJ 70 the Court of Appeal held that:

> The law in this country gives greater latitude to a person who is attacked than does the law in England. The question in such cases is not whether there was an actual continuing danger, but whether there was a reasonable apprehension of such danger. If such a condition exists, the person attacked is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if in a conflict between them, he happens to kill, such killing is justifiable.

In delivering the judgment of the Court Mathew CJ referred to the Indian case of *Alingal Kunhinayan v. Emperor* ILR 28 Mad 454 wherein a passage from *Mayne's Criminal Law of India* 4th Edn., at p. 231 is set out as follows:

> But a man who is assaulted is not bound to modulate his defence step by step, according to the attack, before there is reason to believe the attack is over. He is entitled to secure his victory, as long as the contest is continued. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if in a conflict between them, he happens to kill, such killing is justifiable. And, of course, when the assault has once assumed a dangerous form every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool by-stander would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger.

In the case of *Govindan Neelambaran v. State of Kerala* [1960] AIR Ker 258 the following passage appears in the judgment of the Court of Appeal:

> It is not necessary nor does the law require that the accused should wait till he receives a grievous injury for the purpose of exercising his right of private defence. In considering whether the accused is entitled to exercise the right of private defence, one has to place himself in the position of the accused in the midst of circumstances in which the accused stood and then form an opinion whether under the peculiar circumstances the accused had not the apprehension of such injuries to his body as would entitle him to exercise his right.

The Supreme Court of India made the following observations in the case of *Jai Dev v. State of Punjab* [1963] AIR SC 612:

> In judging the conduct of a person who proves that he had a right of private defence, allowance has necessarily to be made for his feelings at the relevant time. He is faced with an assault which causes a reasonable apprehension of death or grievous hurt and that inevitably creates in his mind some excitement and confusion. At such a moment, the uppermost feeling in his mind would be to ward off the danger and to save himself or his property, and so, he would naturally be anxious to strike a decisive blow in exercise of his right. It is no doubt true that in striking a decisive blow, he must not use more force than appears to be reasonably necessary. But in dealing with the question as to whether more force is used than is necessary or than was justified by the prevailing circumstances, it would be in appropriate to adopt tests of detached objectivity which would be so natural in a Court room, for instance long after the incident has taken place. The means which a threatened person adopts or the force which he uses should not be weighed in golden scales. To begin with, the person exercising a right of private defence must consider whether the threat to his person or his property is real and immediate. If he reaches the conclusion reasonably that the threat is immediate and real, he is entitled to exercise his right. In the exercise of his right, he must use force necessary for the purpose and he must stop using the force as soon the threat had disappeared. So long as the threat lasts and the right of private defence can be legitimately exercised, it would not be fair to require that 'he should modulate his defence step by step, according to the attack before there is reason to believe the attack is over'. The law of private defence does not require that the person assaulted or facing an apprehension of an assault must run away for safety. As soon as the cause for the reasonable apprehension has disappeared and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence danger is continuing, the right is there; if the danger or the apprehension about it has ceased to exist, there is no longer the right of private defence.

It is in the light of the provisions in the Penal Code on the right of private defence and the principles enunciated in the decided cases to which I have referred that the present case has to be considered. The accused is of slight build and his superior officer has said that he is a very passive man who would not involve himself in any trouble. The deceased who was a bigger and stronger person than the accused was the aggressor throughout this unhappy episode. The accused was at the receiving end and at one stage when they were on the opposite sides of the counter the accused even apologised to the deceased in order to avoid trouble. But the deceased would not be pacified. According to the evidence of his own friend Loi Ngok Wan the deceased was quarrelling and shouting almost non-stop. And the fact that the accused was armed with a revolver while the deceased was unarmed cannot affect the right of private defence which was available to the accused. The question which the Court has to decide is whether in all the circumstances of this case the accused had a reasonable apprehension that the deceased would cause his death or inflict grievous hurt to his body. The law on this point was stated in the case of *Survade v. State of Gujarat* [1972] 2 Cr LJ 1574) as follows:

> There is nothing in the law of private defence to suggest that the right of private defence of body cannot be claimed against an assailant who is not armed with some sort of weapon. Looking to the plain language of s. 100 of the Indian Penal Code it appears that, the question whether a person has a right of private defence in a given case depends on the manner in and the ferocity with which he attacked and the apprehension in his mind resulting from such an attack and not on the question whether, he was armed or otherwise. If in view of the attack he has a genuine apprehension that the person assaulting him would either cause him death or grievous hurt to him he would be justified in causing the death of his assailant in exercise of the right of private defence irrespective of the fact whether the assailant was armed or not.

On the evidence as a whole I find that at the stage when the accused and the deceased were struggling for the revolver the accused had a reasonable apprehension of death or grievous hurt at the hands of the deceased. There was no way out for the accused as he was cornered in the small space near the toilet. The assault by the deceased had indeed assumed a dangerous form and the accused was placed in situation of such great peril that he had no time to think or do anything else but to fire the shot from his revolver. His act which caused the death of the deceased was done in the exercise of his right of private defence and was not in excess of that right. The accused is accordingly entitled to an acquittal and I hereby order that he be acquitted and discharged.

Also found at [1981] CLJ 93